Supreme Court No. 84894-7

Court of Appeals No. 62843-7-1

SUPREME COURT
OF THE STATE OF WASHIGNTON

SCOTT E. STAFNE,

Petitioner

vs.

SONOHOMISH COUNTY AND
SNOHOMISH COUNTY PLANNING DEPARTMENT

Respondents

STAFNE'S REPLY TO COUNTY'S ANSWER TO STAFNE'S PETITION FOR REVIEW

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STAFNE'S REPLY

Stafne's proposal to have the *existing* development regulations generally consistent with the *existing* comprehensive plan applied to the *existing* Twin Falls reconfigured rural settlement parcels was prompted by the fact that the County did not have available records of all those lots which had been reconfigured to include portions of DNR land through final ministerial boundary line adjustments. *See* text of Stafne's proposal, Clerk's Papers, pp. 162 - 165; *See also* deposition of County's CR 30 (b) (6) designee, CP, pp. 349 - 355, deposition 77:5 - 100:10[1]. One of Stafne's arguments asking the County Council to change the land classification for all the boundary line adjusted parcels in Twin Falls rural settlement was that: ".. it is the position that TFE Community no longer meets the definition of Commercial Forest Land , which is the County's basis for its CFL (Commercial Forest Land) and (Forest Transition Land) land use designations. ..." CP 165. This and other Stafne arguments were designed to show pursuant to SCC 70.34.030 (a) and (d) that the County's final land use decisions reconfiguring land parcels in the Twin Falls

[1] This potion to the County's designee's deposition illustrates the Planning Department's belated and incompetent attempt to apply the repealed (not ***existing***) statutory definition of Forest Land and County criteria for Forest Land to DNR parcels (not those reconfigured parcels which actually ***existed*** in the Twin Falls Estates rural settlement).

Estates rural settlement had created lots which no longer met the statutory definition of Forest Land or Snohomish County's criteria for Forest Land.

Snohomish County and the Snohomish County Planning Department (hereafter referred to as County) urge this Court not to review Stafne's claim that the consequences of a final land use decision should be resolved *via* a declaratory judgment action. Rather the County urges this Court hold that the consequences of the County's final use decisions reconfiguring specific lots pursuant to LUPA should be determined as part of a legislative process. To use the County's own words:

> "The County was clear in its Response Brief to the Court of Appeals that it was not challenging the validity or ***effect*** of Stafne's [Twin Falls rural settlement owners'] boundary line adjustments. County Response Brief, p. 25 A boundary line adjustment is a ministerial land use action approved at the administrative level by county planning staff. See Chelan v Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002). The legal effect of a boundary line adjustment, plain and simple, is to create new boundaries of property. Stafne's [Twin Falls' parcel owners and the DNR] boundary line adjustments are final land use decisions and the County does not dispute that the legal boundaries between properties in Twin Falls Estates [and property once owned by the state DNR], including Stafne's property, have changed.
>
> What is at issue in this case is not the status of Stafne's boundary line adjustments, but the County Council's decision not to adopt Stafne's legislative proposal to change the GMA comprehensive plan designation of his property. ..." [Emphasis Supplied] County's Answer to Stafne's Petition for Review, pp. 2 - 3.

Stafne disagrees with the statement that the County is not challenging the "effect" of the boundary line adjustments which occurred in the Twin Falls rural settlement when pieces of DNR land were incorporated into Stafne's and other home owners' residential parcels. The effect of this reconfiguration was to leave Stafne's reconfigured lot, as well as the reconfigured lots of other home owners in Twin Falls rural settlement, with parcels of land which no longer met the GMA's statutory definition of Forest Land or the County's criteria for Forest Land. So obviously Snohomish County is challenging the legal effect of these ministerial decisions which it admits are now final. The County is claiming that these final land decisions which changed the fundamental character of these lots with regard to the definition and characteristics of Forest Land had no legal effect at all.

Stafne was prevented from bringing a declaratory judgment on behalf of all of the owners in Twin Falls rural subdivision because he did not have access to the Assessor's records regarding the reconfigurations of each lot. *See* Deposition of County's CR 30 (b) (6) designee, p. 338 - 339, deposition 32:22 - 34:25. But he did have access to his own final boundary line adjustment and therefore sought a declaratory judgment regarding the effect of that final land use decision. Stafne reasoned the same principles that applied to his lot likely would be applicable to all

other reconfigured lots, which did not meet the GMA's definition of Forest Land and/or the County's criteria of Forest Land, in the Twin Falls Estates rural settlement.

The County's claim that Stafne has no legal authority supporting his claim that the Courts, not the County legislature or the Growth Management Hearing Boards, declare the legal effect of site specific final land use actions is not true. *See e.g. Woods v Kittitas County*, 152 Wn.2d 597, 610 - 613, 174 P. 3rd. 25 (2007); *Feil v Eastern Washington Growth Management Bd.*, 153 Wn.App. 394, 220 P.3d 1248 (2009) (Superior Courts have jurisdiction of appeals of site-specific land use actions; Growth Management Hearing Board's do not have jurisdiction to hear controversies regarding site-specific land use decisions.) Moreover, the most basic principles of the Separation of Powers hold that judicial power applies existing law to existing facts; which is precisely what Stafne wanted done. *See e.g. Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 29 S.Ct. 67, 69, 53 L.Ed. 150 (1908). In *Prentis* Justice Holmes postulated:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.'

> 'In applying tests to distinguish legislative from judicial powers, courts have recognized that it is the nature of the act performed, rather than the name of the officer, board or agency which performs it that determines its character as judicial or otherwise.

Washington law follows this basic analysis. *See e.g. Francisco v Board of Directors of Bellevue Schools, Dist. No. 405,* 85 Wn.2d 575, 579 - 583, 537 P.2d 789 (1975); *Ledgering v. State*, 63 Wn.2d 94, 103 - 104, 385 P.2d 522 (1963). Stafne's proposal to the County makes clear that it was the position of the owners of Twin Falls Estate rural settlement parcels that the *existing* reconfigured lots did not meet the *existing* statutory definition of Forest Land. CP 165, paragraph 18. SCC 37.40.030 (a) and (d) required the County Planning Department to apply the *existing* GMA and the County Forest Land criteria to the *existing* reconfigured lots. Meeting these legal requirements were essentially the only substantive tasks imposed by the ordinance for obtaining a favorable recommendation from the Planning Department for passage of a citizen's proposals. The law is clear in Washington that legislative decision making cannot be premised upon a legislative finding of adjudicatory facts. *City of Tacoma v O'Brien*, 85 Wn.2d 266, 271 - 272, 52 P.2d 114 (1975). But that is exactly what the County's ordinance requires.

It is important for this Court to note that unlike petitioners in *Torrance v King County*, 136 Wn.2d 783, 966 P.2d 891 (1998) and in

most LUPA actions, Stafne was not seeking to have the 1995 Comprehensive Plan or development regulations, or site specific final land use decisions reversed. Stafne's request was to have those final land use decisions declared and enforced. For as is explained at pages 37 - 41 of Stafne's opening appeal (and is not disputed by the County) once the final land use decisions were made reconfiguring the parcels insides Twin Falls rural settlement none of these parcels continued to meet the *existing* statute's definition for Forest Land and the County's criteria for Forest Land.

One reason this Court should reject the County's argument not to consider whether a declaratory judgment is an appropriate way to resolve the legal effect of final land use decisions that have not been timely appealed pursuant to LUPA is because Snohomish County believes the procedural law regarding such determinations is sufficiently unclear to enable the County to enact an ordinance requiring the Planning Department to make these type of judicial determinations.

If the proper procedure to clarify the consequences of an unappealed specific land use decision is not clear under existing law then this Court has a duty to clarify how the separation of powers works in these circumstances. For as this Court noted in *Hale v Wellpinit School District No. 49*, 165 Wn.2d 494, 503, 198 P.3d 1021 (2009): "The

brilliance of our constitution is in its multiplicity of checks and balances." (citing *State v. Evans,* 154 Wash.2d 438, 445, 114 P.3d 627 (2005))

While it is true the "separate branches must remain partially intertwined to maintain an effective system of checks and balances. ... The art of good government requires cooperation and flexibility among the branches." Id., at 507. Notwithstanding the need to for the branches to cooperate with one another it remains the province and duty of judiciary to declare how the separation of powers works in instances such as this. *Hale*, Id., 505 - 506, citing among other cases *Marbury v Madison*, 5 U.S. (1 Cranch) 137 at 177 (1803) (quoting *United States v. Nixon,* 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)).

Of course, it should be noted the County, even when it is claiming to act in a legislative capacity, is not a co-equal branch of government. This is an important consideration in this case as the evidence suggested that a purpose behind the promulgation and enforcement of SCC 34.70 was to prevent any judicial review of the County's decisions regarding citizen docketing proposals. *See* CP, Declaration of Gene Miller. To the extent the ordinance was designed to usurp power from the state judiciary it not only runs afoul of the separation of powers clause, but also the state supremacy clause, Article XI, Section 11, because it attempts to arrogate

unreviewable judicial power regarding municipal land use decisions made pursuant to state and municipal law to the county legislative authority.

The County's argument that Stafne's facial challenge to SCC 34.70 should not be considered has little merit. RAP 2.5 (a) (3) provides that a "manifest error involving a constitutional right" can be raised on appeal. In *Wenatchee Reclamation Dist. v Mustell*, 35 Wn.App. 113, 119, 665 P.2d 909 (1983), *aff'd,* 102 Wn.2d 721, 684 P.2d 1275 (1984) it was held that constitutional challenges to statutes may be raised for the first time on appeal under RAP 2.5 (a) (3). This Court has also held that a court will hear arguments not raised at trial if the claimed error is a "manifest error affecting a constitutional right". *State v WWJ Corp.*, 138 Wn.2d 595, 601, 980 P. 2d 1257 (1999). An error is manifest if it results in prejudice. *Id.* at 602-603.

The secret application of the wrong statutory definition of Forest Land to Stafne's proposal, coupled with the failure to observe the state supremacy clause, in applying the GMA and county criteria pursuant to SCC 34.70.030 (a) and (d) was prejudicial as it provided the County Council a wrong legal adjudication upon which to base a legislative decision without allowing Stafne a reasonable opportunity to dispute the Planning Department's erroneous judicial conclusions.

Additionally, it should be noted that the County admits that Stafne facially challenged the ordinance provisions at the trial court and before the Court of Appeals. County's Answer 4 - 7. Stafne's argument here is no different than that which he has previously advanced and which the County has never responded to. For example, in his opening brief to the Court of Appeals Stafne wrote:

> "In summary, SCC Chapter 30.74 sets up as prelude to the County Council's legislative process a kangaroo court, *i.e.*, the Planning Department. It is this kangaroo court's surreal application of law to facts done in secret and outside public view which is the only basis for failing to pass Stafne's proposal onto the final docket for legislative consideration.
>
> This is not good faith legislating because the process infringes upon the judicial power of the courts pursuant to Wash. Const. art IV§ 1, the supremacy of state law pursuant to Wash. Const. art. XI § 11, and Stafne's rights to the open administration of justice pursuant to Wash. Const. art. 1 § 10."

Stafne's Opening Appeal Brief, p. 47. *See also* pages 47 - 50

In his reply brief Stafne charged the County had not disputed that it acted contrary to law and/or in an arbitrary or capricious manner. Stafne's Reply Brief to the Court of Appeals, p. 18. With regard to the facially invalidity of SCC 74.30 Stafne asserted:

> Stafne's facial challenge does not turn on whether the Planning Department's activities are characterized as the "practice of law" or "judicial review". Stafne's facial attack is based on SCC Chapter 30.74 delegating fact finding and adjudicatory powers regarding real property to non-lawyers via an ordinance that is specifically intended to prevent any later judicial review of those preliminary quasi-judicial

> administrative decisions which are a predicate for later municipal legislative consideration.
>
> The County's argument that Stafne "ignores the special role administrative agencies play in implementing law in modern day American society" is absurd. Virtually all administrative decision making in America is subject to review by the Courts. Only in Snohomish County is there an administrative process in place that makes unskilled laymen the ***final arbiters*** of whether citizen proposals regarding their real property are consistent with state, federal, and municipal law. Of course, this unchecked judicial power comes in handy for planners as they can use it during phase one of the docketing process to quickly get rid of pesky citizen proposals.
>
> Washington Courts have inherent power to strike down legislative enactments when necessary to preserve and protect the judicial power granted the judiciary by the Washington Constitution. *See* cites at OB, pp. 49. The Superior Court should have exercised this power to declare Snohomish County's docketing process an unconstitutional infringement upon judicial power. Stafne's Reply Brief in the Court of Appeals, pp. 22 - 23.

Determining which of the state branches of government has the power through which venue (statute or constitution) to declare the consequences of unappealed land use decisions under LUPA is an important issue which should be resolved for the sake of land owners and municipalities. The options appear to be judiciary via the declaratory judgment statute; or the Growth Management Board via the GMA[2]; or the

[2] As the Court of Appeals observed in the decision being challenged here the Growth Management Board has repeatedly refused to assert jurisdiction over a municipality's refusal to pass a legislative proposal onto a GMA docket. Additionally, in *Feil v Eastern Washington Growth*

judiciary via LUPA; or the judiciary via a Constitutional writ; or judiciary via its inherent Constitutional jurisdiction over arbitrary or capricious legislation.

CONCLUSION

There is no way under our Constitutional system that Snohomish County can reserve unreviewable judicial power to its planning department and County Council. Therefore, this Court should grant review of the Separation of Powers and Supremacy issues at the heart of this case and tell us all how the legal consequences of unappealed final land use decisions are determined in the 21st century.

Respectfully Submitted,

S/Scott E. Stafne

Scott E. Stafne

Management Bd., 153 Wn.App. 394, 220 P.3d 1248 (2009) the Court of Appeals in response to this Court's transfer of a case where a Growth Management Board refuse to exercise jurisdiction over a site specific action claimed to be in violation of the GMA affirmed the Board's decision that it lacked jurisdiction to decide a site specific land use action. *Feil* did not involve an action, like the one in this case, where Stafne alleged that unappealed land use decisions of site specific decisions were generally consistent with the County's Growth management Plan.

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Please find attached for filing a copy of "Stafne's reply to Snohomish County's Answer to Stafne's Petition for Review" in Stafne v Snohomish County, Supreme Court No. 84894-7.

Thank you.

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